BEFORE THE
CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

In the Matter of:

GLORIA G HERNANDEZ
(Claimant)

PRECEDENT DISABILITY
DECISION NO.
P-D-487
CASE NOS. D-98-1327
D-98-1328

SSA No.

EMPLOYMENT DEVELOPMENT DEPARTMENT
ATTN: TERENCE R. SAVAGE
LEGAL OFFICE – MIC 53

OA CASE NOS. OC-D-29154
OC-D-29155

PROCEDURAL HISTORY

The claimant appealed two Notices of Determination and Overpayment issued by the Employment Development Department (EDD). This matter was heard before an administrative law judge in the San Jose Office of Appeals of the Board. Prior to the issuance of a decision by the administrative law judge, the Board removed this matter to the Board itself for review and decision, in accord with Section 412 of the Unemployment Insurance Code.

In the present case, oral argument regarding the statute of limitations was made at the hearing, but a brief was not submitted. Instead, EDD's post-hearing brief filed in companion case Case No. SJ-D-24410 was submitted and served on the other party, as the statute of limitations issue is identical to the one in this case. That brief is admitted into evidence and made a part of the record.

After the matter was removed to the Board itself, the Board requested and received further written argument, which was served on the opposing party, to supplement the hearing record. As testimony and argument have both been received and are hereby admitted into evidence, this decision follows.

STATEMENT OF FACTS

The claimant appealed notices that held that she was:

(1) Ineligible for disability insurance benefits beginning October 15, 1989; and beginning February 2, 1991, on the grounds that she had not been examined by or under the care of a physician during these periods, as required by section 2706-1(a), Title 22, California Code of Regulations;

(2) Disqualified for benefits under section 2675 of the code beginning 1/31/98, until she has certified for benefits for 92 days in which she is otherwise eligible on the grounds that she made a willful false statement or willfully failed to report a material fact in order to obtain benefits;

(3) Liable for repayment of overpayments in the amounts of $4,927; and $3,388.29 on the grounds that benefits were paid to her during the periods in question before it was determined that she was ineligible for such benefits; and

(4) Liable for 30 percent penalty assessments under code section 2735.1 in the amounts of $1,478.10 and $1,016.49 on the grounds that the overpayments resulted from the claimant's false statements.

This claimant is one of more than 1000 claimants who have received Notices of Determination and Overpayment following the investigation, indictment, arrest, and criminal prosecution of Dr. Leslie Szalay, a chiropractor who certified the claims for disability benefits. In addition to Dr. Szalay, other personnel in the chiropractic office were also found guilty of fraud and criminal conspiracy. The facts are as follows.

In August 1991, a senior investigator for EDD was contacted by a supervisor in the San Jose state disability insurance field office and asked to investigate a large number of claims that had been submitted by the same chiropractor. The chiropractor, Dr. Szalay, was found to have submitted more disability insurance claims during the period in question than did all of the physicians combined from the local Kaiser hospital. Szalay certified an average of 25 claims per week during the period January 1, 1989 through June 1, 1992.

The investigator's preliminary investigation disclosed that the questionable claims had certain similarities that made them suspect. Many contained the same diagnosis and/or prognosis. Often the claims used the same mailing address. The claims frequently included a request that the claim be backdated, resulting in a large first SDI check. When the claims contained a request for backdating, all indicated the delay in filing was not the fault of the claimant but rather was caused by the claim having been misplaced in Szalay's office.

In March 1992, a search warrant was served on Szalay's office, as well as the residences of Szalay and other persons running the clinic. All records were seized in March 1992. Szalay's office was closed then, and he ceased doing business as of June 1, 1992.

In April 1993 the Santa Clara county grand jury issued seven indictments against Szalay and others connected to his office on charges that the disability insurance fund was defrauded in the amount of $4.9 million dollars.

On July 18, 1994 Szalay pled guilty and admitted filing false disability insurance claims, making false medical certifications, and conspiring to file false disability insurance claims. He was sentenced in September 1994.

All but one of the others indicted entered into negotiated plea agreements between April 1993 and September 1994. Only one person, Julian DeMedeiros, chose to go to trial.

In June 1995 DeMedeiros, the chiropractic office manager, was found guilty of 72 counts of fraud and conspiracy. The case is presently believed to be on appeal.

On March 27, 1996 a judgment and victim restitution order was entered into, wherein Dr. Szalay agreed to repay EDD over $5.2 million.

On or about January 31, 1998, the above-mentioned notices of determination and overpayment were issued to each and every claimants who had filed a claim for disability insurance benefits certified by Dr. Szalay during the period in question. Although the grand jury proceedings started in March 1993, with an indictment issued against the chiropractor and office manager in April of 1993, EDD chose not to take administrative action until completion of the criminal action, at the request of the Santa Clara County District Attorney's Office.

The notices of determination and overpayments were issued to every person who had filed a claim for disability insurance benefits with Dr. Szalay as the treating physician. They were issued more than six years after the start of the initial investigation, more than five years after the search warrant was served and all medical records seized, and more than four years after the grand jury indictment of the chiropractor and office manager. Additionally, the determinations and notices of overpayment were issued more than three years after the chiropractor pled guilty in July 1994 to filing false disability insurance claims.

The issue to be resolved in this case is whether EDD's action in issuing the determinations and overpayments in January 1998 is barred by the statute of limitations. This issue must be resolved before the underlying merits of the cases can be reached.

EDD asserts that if there is fraud involved, then there is no statute of limitations to recover repayment of funds wrongfully distributed. Alternatively, if a statue of limitations applies, then EDD's actions fell within the time limits.

REASONS FOR DECISION

The notices of overpayment were issued pursuant to Unemployment Insurance Code section 2736, which provides:

> The Director of Employment Development Department shall determine the amount of the overpayment and shall notify the recipient of the basis of the overpayment determination. In the absence of fraud, misrepresentation, or willful nondisclosure, notice of the overpayment determination shall be mailed to or personally served on the recipient within two years after the beginning of the disability benefit period for which the overpayment was made.

The Department asserts that because section 2736 specifies a two-year time limit in the absence of fraud but is silent as to the limitation of the action in cases of fraud, by implication the Legislature intended there to be no limitation on actions involving fraud. This position is untenable for the following reasons.

I. DUE PROCESS REQUIRES A TIME LIMITATION

In all of California criminal and civil law, there are only three acts which do not have any limitation: murder, embezzlement of public funds by a public official, and kidnapping.[1]

Despite the egregious conduct alleged by the Department in the present action, it is not the type of action contemplated by the Legislature for which no statute of limitations applies.

Code of Civil Procedure (CCP) section 312 specifically provides:

> Civil actions, without exception, can only be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute.[2]

Although the Legislature may expressly exclude the general provisions of the Code of Civil Procedure by statutes that provide their own limitations, this is not done by means of implication through silence on the issue. Rather, it is done only by express exclusion, as is common in the Revenue and Taxation Code. (See 3 Witkin, California Procedure, 4th edition, Actions, "Scope of Limitation Statutes," section 420; and Revenue Code 177(c)).

EDD asserts that the fact that the Legislature did not specifically refer to the Code of Civil Procedure in enacting Unemployment Insurance Code section 2736 means that there is no

---

[1] Penal Code section 799 states:

> "Prosecution for an offense punishable by death or by imprisonment in the state prison for life . . may be commenced at any time."

[2] The Code Commissioner Notes following that section states, "Statutes of limitation are passed to prevent the production of stale claims when, from the lapse of time, it has become difficult or impossible to furnish the requisite proof to defeat them. They proceed upon the theory that the delay, for a fixed period, to assert one's claim, raises a presumption of settlement, and that a party ought not to be afterwards harassed respecting it."

limitation on an action for notice of overpayment based on fraud. But see 9 Witkin, Cal. Proc. (4th) Administrative Proceeding, "Statutes of Limitations," section 110, which states:

> "In the absence of special statutes, the general statute of limitations apply to review of administrative decisions."

We reject EDD's initial argument. A statute of limitations must apply, and the next question is which statute is applicable. [3]

II. ACTIONS FOR RECOVERY OF MONEY PAID DUE TO FRAUD ARE SUBJECT TO THE THREE-YEAR LIMITATION PERIOD SET FORTH IN CODE OF CIVIL PROCEDURES CODE SECTION 338(d)

Code of Civil Procedure Section 338(d) specifically provides for a three year statute of limitations for an action for relief on the ground of fraud or mistake. "The cause of action in that case is not deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

Because the substance of this action is recovery of money paid due to fraud, the three-year limitation set forth in the Code of Civil Procedure applies.

In Creditors Collection Service of Orange County v. Castaldi (1995) 38 Cal.App.4th 1039, 45 Cal.Rptr. 2d 511, the court held a bank's action against a former customer for repayment of money mistakenly kept by the customer was subject to CCP Section 338(d) for the three year statute of limitation for actions for relief based on grounds of fraud or mistake. The substance of the action was recovery of money paid to the customer by mistake, and since a specific limitations provision prevails over a more general provision, the three-year limitation applies from the time the aggrieved party discovered the facts constituting the fraud.

That this action involves the recovery of money cannot be gainsaid, in light of EDD's issuance of the Notices of Overpayment coupled with the accusation that the claimant received the money due to a false statement. Since EDD's actions are subject to the three-year statute, the next question is when the statute began to run.

III. THE THREE-YEAR LIMITATION PERIOD BEGAN TO RUN FROM THE TIME THE DEPARTMENT KNEW, OR SHOULD HAVE KNOWN, OF THE FACTS CONSTITUTING THE FRAUD

---

[3] Further, Unemployment Insurance Code section 2125 does specifically provide a four-year limitation period after discovery of the offense for actions against individuals who falsely certify the medical condition of any person in order to obtain disability insurance benefits, in violation of Code section 2116.

To argue that the masterminds of the criminal conspiracy are protected by the four-year limitation, while the claimants, who were not prosecuted criminally, have no limitation period for a civil action, is an untenable position and a violation of due process, which the Legislature could not have intended.

In order to resolve the issue in the instant case, it must be determined when EDD discovered (or should have discovered) the facts constituting the fraud.

EDD asserts that it is only upon the final conviction of the chiropractor and the office manager that it could be aware of the full scope of fraudulent conspiracy and be able to evaluate each claimant's involvement in the scheme to defraud. However, case law does not support this position.

In holding that California's three-year statute of limitations for fraud commences when the parties discover or could have discovered the fraud with the exercise of reasonable diligence, the court in Eckstein v Balcor Film Investors, (7th Cir.1993) 8 F.3d 1121 states at p. 1128:

> Victims of fraud usually discover the problem long before the wrongdoer stands up and confesses. Plaintiff's position amounts to an assertion that the time to sue does not start until the extent of the injury becomes clear. But the question under California law is when the investors discovered (or should have discovered) the deceit, not when the full consequences of that deceit are felt. An investor can be defrauded before any loss is realized. Discovery of the fraud means the discovery of the misrepresentation. Investors must bring their claims as soon as they become aware of the misrepresentations or omissions, instead of waiting. . . . .

In March 1992, a search warrant was issued and served on the chiropractor's office, as well as other residential locations of the doctor and staff running the chiropractic clinic.

Penal Code section 1525 provides:

> A search warrant cannot be issued but upon probable cause.

In November 1992, following the seizure of all documents in March 1992, a report was made by EDD to the Santa Clara County District Attorney's Office, which resulted in a 47-page grand jury indictment against the chiropractor, the office manager, and other office staff and related individuals, in April 1993.

EDD issued the notices of determination and overpayment to each and every claimant who had filed a claim for disability insurance benefits certified by Dr. Szalay during the entire period in question.

There is no evidence that the information used to issue the determinations and assess the overpayments was any different from the evidence used to obtain the criminal indictments against the doctor and the office manager in April 1993. EDD was in possession of the information before it turned it over the District Attorney's office. Although EDD now asserts that it had limited access to the evidence after it was given to the District Attorney, there is no reason why EDD could not have requested or retained copies for its own use until the evidence was released by the DA.

EDD had sufficient probable cause regarding fraudulent claims to obtain a search warrant and seize all the medical files in March 1992, yet it chose not to proceed against individual claimants. EDD had sufficient information regarding the fraudulent claims in November 1992 to make a report to the Santa Clara County District Attorney's Office, resulting in the April 1993 grand jury indictment of the doctor and the office manager.

Despite all these investigations and indictments, EDD chose not to proceed against individual claimants until January 1998.

EDD made a policy decision not to pursue the administrative actions until completion of the criminal actions, specifically the conviction of DeMedeiros, a conviction that is currently on appeal. However, for purposes of disability insurance law, the key person in claim filing, besides the claimant, is the certifying physician. Once Szalay was indicted, or at the least convicted, there was no reason for EDD to wait. Even if one assumes EDD waited so as not to jeopardize DeMedeiros' trial, that cannot explain why notices were still not sent to claimants until nearly three years later. No further investigations were ongoing, no new information was coming forth. Indeed, the notices of determination and overpayment were based on the very same information that was gathered as far back as 1992.

There was no legal reason that the notices could not have been issued to each of the claimants in 1993, following the grand jury indictment of the chiropractor and the office manager. EDD, simply put, made a conscious choice not to proceed until later.

In an action by a county to obtain reimbursement of payments made by the county under the Aid to Families with Dependent Children program, the court held the action was subject to the three-year limitation period set forth in CCP Section 338 Subdivision 1, and that defendant was therefore not liable for payment made by the county more than three years prior to initiating the action. San Mateo County v. Booth (1982) 135 Cal App. 3d 388, 185 Cal.Rptr.349.

Similarly, in People v. Bell (1996) 45 Cal. App. 4th 1030, 3 Cal.Rptr.2d 156, the court explains the limitation regarding the discovery of the offense as follows:

> The statute commences to run after one has knowledge of facts sufficient to make a reasonably prudent person suspicious of fraud [In this case, forgery and filing a false document] thus putting him on inquiry.

Finally, see Harley-Davidson Motor Company Inc. v. Custom Cycle Delight, Inc. (1982), 664 F. 2nd 1371, in which the plaintiff contended that it did not discover the defendant's participation in the conspiracy until the defendant had pleaded guilty to Federal criminal charges.

The court noted that under California case law, if the plaintiff knew of the government's criminal charges against the defendant, that would constitute constructive notice of the defendant's participation in the fraud. Here, EDD knew of the indictments when they were issued.

As the case law cited above clearly establishes, the limitation period began to run from the time EDD knew, or should have known, of the fraudulent claims. Construing the facts in this case in

the light most favorable to EDD, they had cause to be suspicious of the filing of fraudulent claims no later than the April 1993 indictment of the key participants of the criminal conspiracy.

Thus, the notices to the claimants should have been issued no later than April 1996 in order to meet the three-year statute of limitations.

IV. ASSUMING ARGUENDO THAT CODE OF CIVIL PROCEDURE SECTION 343 APPLIES, THE FOUR-YEAR STATUTE OF LIMITATIONS BEGAN TO RUN NO LATER THAN THE DISCOVERY OF THE OFFENSE

Code of Civil Procedure, section 343, provides:

> An action for relief not hereinbefore provided for must be commenced within four years after the cause of action accrues.

EDD argues that, if the Board rejects its position that no statute of limitations applies, then this matter is governed by CCP section 343. However, section 343 applies only to actions not covered in the proceeding sections of the Code of Civil Procedure. McAdams v. McElroy (1976) 62 Cal. App. 3d 985, 133 Cal.Rptr.637.

As discussed above, the Board has concluded that the three year statute of limitations set forth in CCP Section 338(d) for recovery of money on the ground of fraud is applicable, and the specific limitations provision would prevail over the more general catch-all provision as set forth in Section 343.

However, assuming arguendo that the four-year limitation applied, it must next be determined when the cause of action in the present case "accrued."

"The cause of action ordinarily accrues when, under the substantive law, the wrongful act is done and the obligation or liability arises, i.e., when a suit may be brought." 3 Witkin Cal. Proc.4th, Actions, "What Constitutes Accrual," section 459.

Again, the Department's position that the cause of action did not accrue until the principals in the conspiracy were convicted is untenable.

The cause of action is based on the alleged fraudulent filing of disability insurance claims in 1989 through 1992. The chiropractor's office was closed as of June 1, 1992. Grand jury indictments were issued in April of 1993. The liability, of course, arose long before final conviction, as did the accrual of the cause of action.

Ultimately, EDD issued its notices of determination and overpayment only after four years had elapsed from the filing of the indictments. The public policy against stale claims for which evidence has become unreliable through lapse of time, lost physical or documentary evidence, and faded memories requires a finding that the statute of limitations has run, at the very latest, in April 1997. (See article entitled 'Statute of Limitations Choices," (1986) 23 San Diego Law

Review, 833; also "Making Sense out of the California Criminal Statute of Limitations." Gerald F. Uleman (1983) 15 Pacific Law Journal 35.)

SUMMARY

The Board and the administrative law judge note for the record in these cases that EDD's attorney, senior special investigator, and field office integrity specialist were extremely well prepared, professional, knowledgeable and courteous to all parties at the hearings. The quality of their work is a credit to EDD, and their efforts, courtesy and professionalism are commendable and were greatly appreciated. However, for reasons that do not alter the relevant factual basis for filing within the statute of limitations, EDD chose not to issue the notices of determination and overpayment until almost five years after the indictments were issued against the doctor and the office manager. Based upon the above analysis, we conclude that the actions are barred by the statute of limitations set forth in Section 338(d) of the California Code of Civil Procedure.

DECISION

The Notices of Determination and Overpayment are dismissed as barred by the statute of limitations in Section 338(d) of the California Code of Civil Procedure.

Sacramento, California December 17, 1998

CALIFORNIA UNEMPLOYMENT INSURANCE APPEALS BOARD

LOUIS WM. BARNETT, Chairperson

INGRID C. AZVEDO, Vice-Chair

JAMES S. STOCKDALE

PHILIP SCOTT RYAN

ROBERT P. MARTINEZ

RUBEN S. AYALA, Abstaining